Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MICHAEL R. WALL,

Petitioner,

v.

GTE SOUTHWEST INCORPORATED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under *St. Mary's Honor Center v. Hicks* an employee in an Americans With Disabilities Act claim is required to establish a *prima facie* case of disability discrimination if there is direct evidence of a per se violation of the Act, i.e., when the employer states that a full duty release is a prerequisite to returning to work.

2. Whether in light of *St. Mary's Honor Center v. Hicks*, an employer can obtain summary judgment in an Americans With Disabilities Act claim without ever articulating what efforts, if any, the employer made to determine if the disabled employee could be reasonably accommodated.

3. What constitutes a showing of a *prima facie* case of discrimination under the Americans With Disabilities Act, and was Petitioner's summary judgment evidence sufficient to establish that he was "otherwise qualified" to perform his job.

4. Whether the Federal Rules of Civil Procedure and *St. Mary's Honor Center v. Hicks* permit a court to grant summary judgment on a Americans With Disabilities Act retaliation claim when the employer's stated reason for the adverse employment act is a per se violation of the Americans With Disabilities Act.

5. Whether the Federal Rules of Civil Procedure permit a court to grant summary judgment on a Tex. Lab. Code Ann. § 21.105 (Vernon Supp. 1995) claim when the summary judgment evidence, even if "scanty", establishes material fact issues regarding Petitioner's ability to perform a job despite his disability.

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Whether the Federal Rules of Civil Procedure permit a court to grant summary judgment on a Tex. Lab. Code Ann. § 451.001 (Vernon Supp, 1995) claim when the summary judgment evidence, even if "scanty", establishes material fact issues regarding the existence of a causal connection between an employee's workers' compensation proceeding and adverse employment actions taken against the employee.

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

A. Michael R. Wall, Petitioner

B. John E. Wall, Jr., Attorney for Petitioner

C. GTE Southwest Incorporated, Respondent

D. Kathleen Bagwell Palter and J. Cody Wilbanks, Attorneys for GTE Southwest Incorporated, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner, Michael R. Wall ("Wall") brought suit against his former employer, Respondent, GTE Southwest Incorporated ("GTE"), pursuant to article 8307c of the Texas Workers' Compensation Act, the Americans With Disabilities Act and the Texas Commission on Human Rights Act. GTE filed a Motion for Dismissal or Summary Judgment with Supporting Brief as to all claims.

In an Opinion dated May 31, 1994, the United States District Court for the Northern District of Texas, Barefoot Sanders presiding, denied GTE's motion for dismissal,

but granted summary judgment as to all of Wall's claims.[1] The district court found that Wall failed to establish a *prima facie* case of retaliation and discrimination under both the Americans With Disabilities Act ("ADA") and the Texas Commission on Human Rights Act. In making this determination, the district court found that the Fifth Circuit had yet to set forth the elements of a *prima facie* case under the ADA. The district court also found that Wall failed to establish a causal connection between his workers' compensation claim and the adverse employment actions taken against him.

Wall timely appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. On May 8, 1995, the Fifth Circuit affirmed the ruling of the district court.[2] Regardless of the need for guidance as to the elements of a *prima facie* ADA case as well as the burden an employer must meet to establish compliance with the ADA as a matter of law, the Fifth Circuit claimed the case had no precedential value and affirmed the case without writing an opinion. Specifically, the Fifth Circuit stated as follows: "Affirmed. See Fifth Circuit Rule 47.6".[3] *See*, Appendix A. In affirming the district court, the Fifth Circuit not only failed to set forth much needed precedential ADA case law; but also ignored the summary judgment evidence supporting Wall's claims.

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[1] This unpublished opinion is printed here as Appendix B.

[2] This unpublished opinion is printed here as Appendix A.

[3] Fifth Circuit Local Rule 47.6 is printed here as Appendix D.

JURISDICTION

This petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on May 8, 1995. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Suit was initially filed in state district court; however, Respondent removed this cause to the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1441. Respondent argued that removal was proper based on preemption under Section 301 of the Labor Management Relations Act.[4]

In this case, Petitioner, Michael R. Wall began working for Respondent, GTE Southwest Incorporated, as a Customer Service Specialist ("CSS") on September 13, 1982. (ROA 250).[5] As a CSS, Wall traveled to GTE's customers' locations to perform installations and repairs on residential and small business telephones. (ROA 250).

On March 6, 1992, Wall suffered a back injury while on the job, working out of GTE's Plano facility. (ROA 250). Wall was taken off from work by his doctor. (ROA 250). After having been off from work as a result of the March 6, 1992 on-the-job injury, Wall returned to work at

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[4] The federal district court rejected Respondent's preemption argument in its May 31, 1994 opinion. (ROA 383-84).

[5] ROA refers to the Record on Appeal in this case.

GTE in approximately July 1992 with permanent restrictions placed on him by his doctor. (ROA 250). Specifically, Wall was released by his treating physician to return to work at his CSS job on a "trial basis" working approximately 4 hours/day with some various physical restrictions. (ROA 250-51). Wall was to follow up with his physician in two weeks to see how he was adjusting at his CSS job with the restrictions. (ROA 251).

Wall was employed as a CSS, but upon his return to work, GTE placed him in a light duty position rather than placing him in his former CSS position. (ROA 251). After Wall was placed under the permanent restrictions by his physicians, GTE never gave Wall the chance or the option to return to his CSS position on a trial basis, either with or without reasonable accommodation. (ROA 251). GTE made no effort to accommodate Wall's disability so as to enable him to perform his CSS job. (ROA 251).

On or about September 17, 1992, Fred Chasak, Wall's supervisor, informed Wall and Robert Grimes (another GTE employee on light duty after an on-the-job injury) that there were four people on light duty. (ROA 252). Chasak told Grimes and Wall that they were being removed from light duty work and placed back on workers' compensation. (ROA 252). According to Chasak, there was not enough light duty work for four employees and that he was placing Wall and Grimes back on workers' compensation. (ROA 252). Bo Ellerbee and Jim Chlebowski, were the other two employees who had previously been working on light duty with Grimes and Wall. (ROA 252). In actuality, Chlebowski was no longer on light duty at this time, but rather had been released to return to full duty work on or about September 14, 1992.

(ROA 252). Thus, contrary to GTE's claim, Chlebowski's light duty position was available on September 17, 1992. (ROA 70, 207, 252).

After Wall was removed from light duty, he later called Barbara Hanson, a union steward, to see what he would need to do in order to return to work. (ROA 252). According to Hanson, Chasak stated that before Grimes and Wall could return to work they would have to receive a full duty release from their doctors or more light duty would have to become available. (ROA 252). Gina Logan, Wall's former supervisor, stated that Wall would have to obtain a full medical release before he could return to a full duty position. (ROA 208). Wall would never receive a full duty release because Wall's restrictions were permanent. (ROA 251). When more light duty became available, GTE did not offer it to Wall but rather filled the position with another employee. (ROA 252-53).

Wall was never offered another light duty position. (ROA 253). Wall was not offered Chlebowski's former light duty position. (ROA 252). By GTE's own admission, Wall, as the next most senior employee, should not have been removed from light duty in September 1992. (ROA 70, 207). Nevertheless, Wall was removed from the workplace. (ROA 252). Thus, Wall was terminated, as opposed to having abandoned his job. (ROA 253).

As of September 17, 1992, GTE failed to allow Wall to return to work and failed to otherwise accommodate Wall's disability. (ROA 251-53). As a result, Wall filed suit to recover damages which he suffered as a result of the actions of GTE which are prohibited under article 8307c of the Texas Workers' Compensation Act ("8307c"), Article 5221k of the Texas Commission on Human Rights Act

("TCHRA") and the Americans With Disabilities Act ("ADA"). (ROA 42-44).

GTE's position that Wall would not be permitted to return to his CSS job without a full duty release is a per se violation of the ADA. Also, GTE failed to articulate in its summary judgment evidence that it made any attempt to accommodate Wall's disability. Nevertheless, GTE's motion for summary judgment was granted by the district court and the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. **The Fifth Circuit's failure to articulate the requirements for establishing a *prima facie* case of discrimination under the Americans With Disabilities Act has left the district courts and litigants of the Fifth Circuit to play an inconsistent guessing game as to whether elements such as replacement by a non-disabled employee are required to establish liability under the ADA.**

In most instances, claims of employment discrimination involve a three-step proof analysis. A plaintiff must establish a *prima facie* case of discrimination. This is followed by the employer defendant's attempt to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Finally, should defendant be successful, then the plaintiff is allowed to prove, directly or indirectly, that the explanation put forth by defendant is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The district court applied this burden shifting scheme to the present case involving the Americans With

Disabilities Act ("ADA").[6] In its opinion, the district court found that the Fifth Circuit has not yet articulated the elements for a *prima facie* case of discrimination under the ADA. (ROA 392). The district court noted that some courts have found that to make a *prima facie* case of discrimination under the ADA, the employee must show that he was replaced by a non-disabled person. (ROA 392-93). In granting summary judgment, the district court found that there was no summary judgment evidence that Wall was replaced by a non-disabled person.[7] (ROA 392-93). On appeal, Wall disputed this requirement for a *prima facie* showing, and set forth his interpretation of the *prima facie* requirements (see below). Regardless of the need for precedential case law, the Fifth Circuit affirmed without setting forth the requirements for a *prima facie* ADA case; thereby, leaving the district courts as well as litigants without guidance as to the elements an employee must establish to maintain a cause of action under the ADA.

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[6] The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a) (West Supp. 1995).

[7] In support of this requirement, the district court cited *Sherman v. Optical Imaging Systems, Inc.*, 843 F.Supp. 1168, 1181 (E.D. Mich. 1994) and *Jones v. Grindstaff*, 1993 WL 498957 (E.D. Tenn. 1993). (ROA 393). Even if this were established to be a *prima facie* requirement, it would not apply to bar this case, because by GTE's own admission, an employee could not be placed in a CSS position without a full medical release. (ROA 208).

In passing the ADA, it appears that the legislature intended that case law established under the Rehabilitation Act of 1973 be used in deciding cases brought under the ADA. *See*, 42 U.S.C. § 12117(b). The Fifth Circuit has noted that the *prima facie* case and the available defenses under the ADA are similar to the Rehabilitation Act. *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993). In accordance with *Chandler*[8] and the legislative intent, a *prima facie* case of discrimination under the ADA appears as follows: (1) the employee is disabled as that term is defined in the ADA[9]; (2) the employee is otherwise qualified to perform his job; (3) the employee was subjected to an adverse employment action.[10]

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[8] The Fifth Circuit has held that the elements for a *prima facie* case of discrimination under the Rehabilitation Act are as follows: (1) the employee is an individual with a handicap as that term is defined in the ACT; (2) the employee is otherwise qualified to perform his job; (3) the employee is employed by a program receiving federal financial assistance; and (4) the employee was adversely treated. *See, Chandler v. City of Dallas*, 2 F.3d 1385.

[9] The ADA defines a disability as: a physical or mental impairment that substantially limits one or more of an individual's major life activities; a record of such impairment; or being regarded as having such an impairment. *See*, 42 U.S.C. § 12102(a)-(c); *Coughlan v. Heinz*, 851 F.Supp. 808 (N.D. Tex. 1994). In this case, Wall has a back injury which limits his mobility, and his ability to lift, carry and stand. (ROA 209, 250-51). The district court properly found that Wall has a "disability" as that term is defined under the ADA. (ROA 388).

[10] GTE failed to accommodate Wall's disability and ultimately terminated him which constitutes an adverse employment action for the purposes of establishing a *prima facie* case. (ROA 251-53).

The district court found that Wall was not "otherwise qualified"[11] for the CSS job, and the Fifth Circuit affirmed. (ROA 388-89, 392). The district court reasoned that Wall was unable to perform all of the essential functions of his CSS job, and that the summary judgment evidence did not raise a fact issue as to whether reasonable accommodation would enable Wall to perform the essential functions of the job. (ROA 391). The Court's reasoning is flawed because: (1) the summary judgment evidence established that Wall could perform the essential elements of his job; and (2) GTE never articulated what efforts, if any, were made to accommodate Wall.

2. In an Americans With Disabilities Act case, summary judgment is not properly based solely on the employer's version of the "essential functions" of a job, particularly when the employee presents controverting evidence.

The flawed ruling that Wall was not "otherwise qualified" hinged on a determination of the essential functions of the CSS job. The district court disregarded the summary judgment evidence presented by Wall regarding his actual duties as a CSS, and exclusively relied on GTE's claimed version of the essential functions of the job. (ROA 389-91). The determination of the functions of Wall's CSS job should have been left for the factfinder in light of the conflicting summary judgment evidence.

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[11] The ADA defines an "otherwise qualified" person as a disabled person, who, either with or without reasonable accommodations, can perform the essential functions of the job he holds or desires. 42 U.S.C. § 12111(8).

Specifically, Wall had various lifting and carrying restrictions with the maximum weight allowed being 58 pounds. (ROA 209). Wall presented summary judgment evidence that frequent heavy lifting was not required, and that he could stay within his restrictions and still perform the CSS duties. (ROA 251, 259). In contrast, GTE claimed that frequent lifting of up to 60 pounds was required. (ROA 311). There was also conflicting evidence regarding whether the job could be performed in a 4 hour shift, which Wall was restricted to, rather than an 8 hour shift. (ROA 209, 250-51, 310-11). Wall presented summary judgment evidence that the CSS job could be performed in 4 hour shifts, and GTE maintained that an 8 hour shift was essential. (ROA 250, 310-11). There was further conflicting evidence regarding the length of time a CSS was required to spend on a ladder. (ROA 251, 310). Wall stated that in the Plano area, where he was assigned to work as a CSS, 90% of the cable was buried and that he did not spend significant time on a ladder or carrying a ladder. (ROA 251, 259). In contrast, GTE claimed that a CSS spends a significant amount of time on a ladder. (ROA 310).

The district court improperly ignored Wall's summary judgment evidence regarding the essential functions of a CSS job.[12] (ROA 391). The legislative intent

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[12] Indeed, as the district court recognized, the ADA gives some weight to an employer's definition of the essential functions of a job. (ROA 391). Section 12111(8) provides that, "[f]or purposes of this subchapter, consideration shall be given to the employer's judgment as to what job functions are essential . . . " 42 U.S.C. § 12111(8). However, contrary to the district court's approach, the ADA does not state that *sole* consideration is to be

regarding the essential elements provision of the ADA was for consideration to be given to the essential elements identified by the employer as well as the employee. *See*, H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 3, at 34 (1990).[13] By disregarding Wall's summary judgment evidence of the essential functions of the job, the district court not only disregarded the legislative intent behind the ADA, but also determined fact issues which should have been left for the factfinder at trial.[14]

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given to the employer's definition of the essential job elements. *See, Id.*

[13] An employer's judgement regarding the essential functions of a job is not conclusive and does not raise any presumption that a particular task is essential.

[14] The district court erred by analogizing this case with *Florence v. Frank*, 774 F.Supp. 1054 (N.D. Tex. 1991). In *Florence*, the court determined that the plaintiff mail carrier was not able to perform the essential functions of the job, even with reasonable accommodations, because he could only work four hours of an eight hour job, and because his physical limitations prevented him from hand delivery of the mail. *Id.* at 1061-1062. The present case is clearly distinguishable from *Florence*. It was determined in *Florence*, that the plaintiff was required to deliver the mail for five out of the eight working hours per day and that the route required walking. *Id.* The *Florence* court also found no alternative means to deliver the mail on this particular route other than by walking the minimum 5 hour route. *See, Florence v. Frank*, 774 F.Supp. at 1062 (plaintiff was not able to perform essential functions of job through any reasonable accommodations and the defendant would not be required to purchase a motorized vehicle). In this case, the essential functions of the CSS job are not so inflexible. There are disputed questions of material fact concerning what is required of a CSS, and whether GTE could have reasonably accommodated Wall.

Consequently, the district court erred in ruling that Wall could not establish a *prima facie* case of discrimination under the ADA, and the Fifth Circuit erred in affirming.

3. To allow an employer to obtain summary judgment without ever articulating that any efforts were made to accommodate an employee's disability flies in the face of the purpose of the Americans With Disabilities Act as well as the evidentiary requirements of *St. Mary's Honor Center v. Hicks.*

The district court further erred in granting summary judgment because there is no summary judgment evidence that GTE made any effort to reasonably accommodate Wall's disability, despite its duty to do so under the ADA. An employer has an obligation to make reasonable accommodations for a disabled individual, unless accommodation would produce undue hardship on the employer. 42 U.S.C § 12112(b)(5) (West Supp. 1995). GTE committed a per se violation of the ADA by failing to accommodate, or even attempt to accommodate, Wall's disability. Wall presented summary judgment evidence that reasonable accommodation would have permitted Wall to perform his CSS job, yet GTE failed to present any summary judgment evidence that it made even a single effort to accommodate Wall at the time he returned to work. GTE clearly failed to meet its burden of establishing a legitimate non-discriminatory reason for its failure

to accommodate Wall; therefore, intentional discrimination is inferred and summary judgment is improper. *See, St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2747.

Instead of placing Wall in his CSS position on a trial basis as his doctor had recommended, GTE, without any investigation, somehow determined that Wall could not perform his CSS job. There was no summary judgment evidence that, at the time Wall presented for work, GTE made any analysis of whether reasonable accommodations could be made for Wall. No doubt the reason GTE failed to present such evidence is because no efforts were made at the time. Instead, GTE only presents an after-the-fact affidavit of Terry Lumpkin wherein he claims that Wall's restrictions could not be accommodated. Not only is GTE's failure to make efforts to accommodate Wall at the time he presented for work a per se violation of the ADA, but Wall presented summary judgment evidence which disputes Lumpkin's affidavit, and establishes alternative means by which he could have performed his CSS job without causing undue hardship on GTE.[15] Thus, GTE failed to meets its burden of production under *St. Mary's* and violated the ADA as well by failing to make efforts to accommodate Wall in his CSS job.

GTE further violated the ADA by making Wall perform light duty work and then terminating him allegedly because there was not enough light duty work. (ROA

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[15] For instance, Wall, who had been performing the CSS job prior to his injury, states in his affidavit that he could have performed his CSS duties during 4 hour shifts, despite his restrictions. (ROA 251-52). Also, other GTE workers had performed the CSS duties in 4 hour shifts in the past. (ROA 259).

251-52). GTE claimed that Wall was removed from the workplace because there was not enough light duty; however, the summary judgment evidence directly controverts this claim. (ROA 70, 207, 252). Moreover, this claim of a "lack of light duty work" does not satisfy GTE's burden of production under *St. Mary's* because GTE violated the ADA by placing Wall on light duty without first attempting to accommodate his CSS job. In reports on the ADA, several congressional committees stated that the employer should not even consider transferring a disabled employee to a vacant position until the employer has attempted to accommodate him/her in the job that he currently holds.[16] *See*, S. REP. No. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 63 (1990). Also, contrary to GTE's actions, the ADA requires job restructuring when it is reasonable. 42 U.S.C. § 12111(9)(B).[17] The ADA specifically provides for part-time or modified work schedules as a "reasonable accommodation". 42 U.S.C.A. § 12111(9)(B). GTE's failure to make efforts to accommodate Wall in his CSS position violates the ADA and precludes summary judgment under *St. Mary's*.

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[16] Allowing a disabled employee to attempt the essential functions of the job which he currently holds before he/she is transferred to a new, vacant position is a form of accommodation which complies with the legislative intent behind the ADA. *See*, 56 Fed. Reg. 35,744 (1991).

[17] Among the considerations which Congress has mentioned are: redelegating certain assignments; permitting a disabled employee to switch assignments with other employees; and redesigning procedures for accomplishing tasks. S. REP. No. 116, 101st Cong., 1st Sess. 31 (1989); H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 62 (1990).

4. GTE's requirement that Wall obtain a full duty release prior to returning to his CSS job is direct evidence of a per se violation of the Americans With Disabilities Act.

GTE placed Wall on light duty for a period of time, but ultimately removed him from light duty and informed him that he could not return to his CSS job without a full duty release. (ROA 207-08). Such actions are anecdotal testimony and constitute direct evidence of a violation of the ADA. To accept GTE's position, Wall could not return to his CSS position even if his restrictions consisted of lifting no more than 5000 pounds on a repetitive basis, i.e., Wall could not return to work without a full release even if his restrictions could be reasonably accommodated. In the presence of direct evidence of discrimination, the employee need not even jump through the evidentiary hoops of *St. Mary's Honor Center v. Hicks*. Thus, the district court erred in granting summary judgment on Wall's discrimination and retaliation claims brought under the ADA.

5. GTE's failure to accommodate Wall establishes the requisite causal connection in a retaliation claim under the Americans With Disabilities Act.

The district court erred in holding that Wall failed to establish a *prima facie* case of retaliation under the ADA. (ROA 386). A *prima facie* case of retaliation is as follows: (1) a showing that the employee engaged in a protected activity; (2) an adverse employment action was taken against the employee; (3) and that a causal connection exists between the adverse employment action and the

participation in the protected activity. *See*, ROA 386, *citing, Harmer v. Virginia Elec. and Power Co.*, 831 F.Supp. 1300, 1308 (E.D. Va. 1993).

In this case, Wall filed charges of discrimination with the EEOC against GTE and requested that his disability be accommodated by placing him in his former position on a trial basis. (ROA 251-54). Wall was denied reasonable accommodations for his CSS job and was ultimately eliminated from the workforce. (ROA 251-53). A "causal connection" is evidenced in that Wall filed discrimination charges with the EEOC prior to his release to return to work in July 1992, yet after being released to return to his CSS position, he was not permitted to do so. (ROA 250-51, 257). Instead, Wall was placed on light duty and was then eliminated from the workplace allegedly because there was not enough light duty work for 4 employees. (ROA 252). This establishes material fact issues regarding whether there is a causal connection between the filing of the discrimination charges and the subsequent refusal to accommodate and termination. The Fifth Circuit erred in affirming summary judgment, particularly in light of GTE's blatant failure to accommodate Wall in violation of the ADA. (ROA 208, 386).

6. **Even if an employer's failure to accommodate and "full medical release" requirements are not considered per se ADA violations, such conduct is evidence of the employer's unlawful motive and precludes summary judgment on Petitioner's ADA discrimination and retaliation claims under *St. Mary's Honor Center v. Hicks*.**

If it is somehow determined that GTE met its burden of production, which it has not, Wall must be given the opportunity to show that the reason asserted is pretextual. *See, St. Mary's Honor Center v. Hicks*, 113 S.Ct. at 2747-50. Justice Scalia writing for this Court in *St. Mary's* reasoned that "[t]he factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, may suffice to show intentional discrimination." *Id.* This Court in *St. Mary's* further held that "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*.' " (emphasis in original) *Id.*

Wall presented ample summary judgment evidence in this case which establishes material fact issues regarding whether GTE's stated reason, or lack thereof, for failing to accommodate Wall and ultimately removing Wall from the workplace was a pretext for discrimination and/or retaliation. (ROA 70, 207-08, 251-54, 259, 261). The district court ignored this evidence and disposed of the entire case via summary judgment, and the Fifth Circuit affirmed. (ROA 385, 388-89, 392-93). This was error because, as previously discussed, there are material fact

issues as to Wall's ability to present a *prima facie* case of discrimination and retaliation, and there are material fact issues regarding whether GTE's stated reasons for its adverse employment actions were a pretext.

Discrimination: Removal from the Workplace

GTE argued in its motion for summary judgment that Wall's discrimination claims must fail because he was allegedly removed from light duty work based on a seniority system. (ROA 66). Here, GTE faces serious credibility problems. Specifically, GTE claims that there was only enough light duty work for two employees, and that Chlebowski and Ellerbee were allegedly retained over Grimes and Wall based on seniority. (ROA 70, 207). In actuality, Chlebowski was released to regular duty prior to the time Wall was removed from light duty; thereby, leaving a light duty position open for Wall, the next most senior employee. (ROA 70, 252). Thus, by GTE's own admission, Wall should not have been removed from light duty in September 1992. Also, after Wall was removed from light duty, seniority was not a factor in GTE's requirements for Wall's return to work. Instead, Wall was told that he would have to have his restrictions (which were permanent) removed before he could return to work. (ROA 251-52). Also, GTE does not claim that seniority factored into another employee being placed on light duty instead of Wall after Wall was removed from light duty. (ROA 253). This raises genuine issues of material fact regarding GTE's credibility and the true reason Wall was removed from light duty, i.e., terminated. The Fifth Circuit has held that discrepancies in testimony

raise credibility issues which are properly for the fact-finder to weigh. *See, Dibidale of Louisiana, Inc. v. American Bank & Trust Co., New Orleans*, 916 F.2d 300, 307 (5th Cir. 1990), *citing Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980). Indeed, the *Dibidale* court held that "credibility assessments are not fit grist for the summary judgment mill." *Id.* at 307.

In light of Chlebowski's return to regular duty and another employee being placed on light duty instead of Wall, the seniority issue only further substantiates Wall's discrimination claims and the unlawful motives for GTE's conduct. Thus, the district court erred in granting summary judgment, and the Fifth Circuit erred in affirming.

Discrimination: Wall was Terminated

GTE also claimed that Wall was not discriminated against because he was not terminated, but rather he abandoned his job. (ROA 65). Contrary to GTE's claim, Wall did not abandon his job. (ROA 253). It was GTE who informed Wall that he would not be returning to work, i.e., that removal of his permanent restrictions was required. (ROA 252). As previously stated, such a condition violates the ADA, and prevented Wall from being able to return to his CSS job. There are genuine issues of material fact regarding whether GTE's refusal to allow Wall, an employee with permanent restrictions, to return to work until he had a full duty release constitutes a discriminatory and retaliatory termination.

Retaliation: Time and Manner of Employer Response

The close proximity in time between Wall's post March 1992 charge of discrimination and the July 1992 refusal to accommodate and September 1992 termination establishes material fact issues regarding whether Wall was retaliated against by GTE. The Fifth Circuit has held that the proximity in time between the participation in the protected activity and the adverse employment action may be considered when determining whether retaliation occurred. *See, Shirley v. Chrysler First, Inc.*, 970 F.2d at 44 (14 month lapse in time between participation is the protected activity and the adverse employment action did not preclude liability for retaliation).

The Fifth Circuit has also recognized that evidence of an employer's hostile reaction to an employee's complaints of discrimination may be used to support a claim for retaliation. *See, Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). In this case, GTE displayed a hostile attitude toward Wall when it refused to accommodate him and then removed him from light duty. (ROA 251-52). Wall's removal from light duty was especially hostile because the reason given to Wall for the removal was unfounded. (ROA 252). It is clear from the summary judgment evidence that if GTE followed its seniority system, Wall should not have been removed from light duty on September 17, 1992. This is further evidence of the pretextual nature of GTE's stated reason for eliminating Wall. *See, Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991) (if it appears to the factfinder that the employer seems to have made a large mistake regarding an employment decision, then the question arises as to whether the decision was a mistake

at all, or rather is a pretext for discrimination); *See also, Brown v. Gerrard Mfg. Co.*, 634 F.2d 273 (5th Cir. 1981) (when a defendant departs from its usual practices or policies when disciplining or taking action against the plaintiff, this raises questions on the issue pretext).

In light of the above, there are genuine issues of material fact regarding the illegitimacy of GTE's stated reasons (or lack thereof) for its adverse actions against Wall, and whether Wall was victim of unlawful discrimination and retaliation. Not only is GTE's conduct with respect to Wall a violation of the ADA, but GTE also has serious credibility problems. Furthermore, GTE failed to meet its burden of establishing a legitimate non-discriminatory reason for its refusal to accommodate Wall and Wall's removal from light duty.[18] Regardless of the district court's characterization of Wall's summary judgment evidence as "scanty", the evidence established material fact issues upon which a reasonable jury could have found in Wall's favor. Therefore, the case should properly have been left for a factfinder. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986).

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[18] It has been held that "legitimacy" connotes more than a requirement that the asserted reason have some factual basis, but it must be "reasonable" under the circumstances. *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. 792. "Nondiscriminatory" suggests that the reason or rule invoked by the employer to justify its action must be equally applied. The mere articulation of an explanation for a defendant's action is of no legal force unless it meets the further conditions of clarity and specificity set forth above.

7. A reasonable jury could have found in Petitioner's favor based on the summary judgment evidence regarding his Tex. Lab. Code Ann. § 21.001 (West Supp. 1995) claim; therefore, summary judgment was not proper.

The district court granted summary judgment on Wall's discrimination claim brought under the TCHRA on the ground that Wall failed to show that he was able to perform his CSS job despite his disability. (ROA 393). In making this ruling, the court relied on the same reasoning used in its analysis of Wall's ADA discrimination claim. (ROA 393).

The district court found that Wall's disability prevented him from reasonably performing his CSS job, and that consequently his TCHRA claim must fail. (ROA 393). Under the TCHRA, a discrimination case, such as Wall's, brought "because of disability" or "on the basis of disability" refers to:

> discrimination because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job.

Tex. Lab. Code Ann. § 21.105 (West Supp. 1995). The court in *Elstner v. Southwestern Bell Telephone Co.*, 659 F.Supp. 1328 (S.D.Tex. 1987) construed the above language of the TCHRA to be similar to the "otherwise qualified" requirement of Section 504 of the Rehabilitation Act of 1973. *Id.* at 1346. As previously discussed in this petition (pp. 11-12), there are sharp fact disputes regarding whether Wall is able to perform the essential functions of his CSS job. The district court characterized Wall's summary judgment evidence as "scanty"; however, in light of

the material fact issues established by the evidence such a determination should have been left for the fact finder to determine. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986).

8. **A reasonable jury could have found in Petitioner's favor based on the summary judgment evidence regarding his Tex. Lab. Code Ann. § 451.001 (West Supp. 1995) claim; therefore summary judgment was not proper.**

The district court granted summary judgment on Wall's claim brought pursuant to Tex. Lab. Code Ann. § 451.001 (West Supp. 1995)[19] reasoning that Wall's summary judgment evidence was scanty and failed to establish a causal connection between his workers' compensation claim and GTE's adverse employment actions. (ROA 395). The Fifth Circuit affirmed despite overwhelming evidence upon which a reasonable jury could have found in favor of Wall.

To maintain a cause of action under § 451.001, the plaintiff need only establish a causal connection between his workers' compensation proceeding and his termination. *Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991); *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 522 (Tex. App. – Corpus Christi 1993, writ dism. agr.). An employee need not prove that the claim for workers'

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[19] Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1992) was repealed and recodified in Sections 451.001-.003 of the Texas Labor Code. This recodification did not change the substantive law.

compensation benefits was the sole basis for the termination. *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App. – El Paso 1986) *aff'd*, 734 S.W.2d 667 (Tex. 1987). The employer must rebut by showing a legitimate reason for the discharge; however, the employee may still recover damages if retaliation was a factor. *See, Jones v. Roadway Exp., Inc.*, 931 F.2d at 1090.

Courts have found the following factors, all of which are evidenced in this case, supportive of the existence of a causal link: **(a) Knowledge of the claim by those making the decision to discharge.** *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d at 658; *Parham v. Carrier Corp.*, 9 F.3d 383 (5th Cir. 1993). See, ROA 70, 207); **(b) Negative comments were made by the employer regarding the workers' compensation claim.** *General Electric v. Kunze*, 747 S.W.2d 826 and **(c) Expression of a negative attitude toward the plaintiff's injured condition.** *Paragon Hotel Corp. v. Ramirez*. Wall's former supervisor David Debusman, openly harassed and ridiculed Wall for filing workers' compensation claims. (ROA 262, 263-66, 270-75, 279-80, 281-82). Among other things, Debusman stated that Wall was faking his on-the-job injuries and that his injuries were "bulls___t". (ROA 263-66, 270-75, 281-82)[20]; Debusman's negative attitude was no doubt fueled by the fact that his future pay raises were determined based on the number

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[20] Debusman had been transferred to another department prior to Wall's return to work; however, Debusman's discriminatory conduct was blatant and continuous. When an employee's unlawful conduct is continuous and pervasive, then the employer is deemed to have had constructive knowledge of the discriminatory conduct. *See, Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649 (5th Cir. 1994).

of workers' compensation injuries in his department. (ROA 279); **(d) Discriminatory treatment of the Plaintiff after being released to return to work by the doctor.** *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d at 658. GTE failed to accommodate Wall with respect to his CSS job.(ROA 209, 251-52); **(f) Inconsistent and contradictory statements by defendants.** *Investment Properties Management v. Montes*, 821 S.W.2d at 695-696. GTE has serious credibility problems with respect to Wall's removal from the workplace. (ROA 70, 207, 252-53).

Although the district court concluded Wall's evidence was "scanty," in light of the ample evidence of the "causal connection" such a determination should have been left for the fact finder to determine. *See, Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 205, 91 L.Ed.2d 202 (1986). The Fifth Circuit erred in affirming summary judgment in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10612

MICHAEL R. WALL,

Plaintiff-Appellant,

versus

GTE SOUTHWEST INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:93-CV-1546-H)

(Filed May 8, 1995)

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.*

PER CURIAM:

Affirmed. *See* Fifth Circuit Rule 47.6.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL,	*	
	*	
Plaintiff	*	Civil No.
v.	*	3:93-CV-1546-H
	*	
GTE SOUTHWEST INCORPORATED,	*	
	*	
Defendant	*	

MEMORANDUM OPINION AND ORDER

(Filed May 31, 1994)

Before the Court are the following: Defendant's Motion for Dismissal or Summary Judgment with Supporting Brief, filed February 18, 1994; Plaintiff's Response and Opposition, filed March 17, 1994; and Defendant's Reply, filed April 1, 1994.

I. BACKGROUND

Plaintiff Wall began working for Defendant GTE as a Customer Service Specialist (CSS) on September 13, 1982. Plaintiff was an hourly employee and a member of the collective bargaining unit represented by Local 6171 of the Communications Workers of America. As a CSS, Wall traveled to Defendant's customers' locations to perform installations and repairs of telephones, aerial telephone

cables, and buried telephone cables. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2.

Plaintiff was working out of Defendant's Plano facility when he injured his back on the job on March 6, 1992. Plaintiff's Response, Affidavit of Michael R. Wall ("Wall Aff."), Pl. Exh. A; Defendants' Motion, Declaration of Douglas Patton ("Patton Decl."), Def. Exh. 2. On March 11, 1992, an incident report was filed which noted that Plaintiff had previously been diagnosed with a bulging disc in his lower back. Patton Decl., Def. Exh. 2 and attachment B. Plaintiff began to receive workers' compensation benefits on March 13, 1992. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2 and attachment C.

On May 26, 1992, David Debusman, who had been Plaintiff's supervisor at Defendant's Plano facility, was transferred to a different department. After the transfer, Debusman had no supervisory authority over Plaintiff. Defendant's Reply, Declaration of Terry Lumpkin ("Lumpkin Decl."), Def. Exh. B. Sometime in May or June of 1992, union representatives filed a grievance alleging that Debusman had discriminated against Plaintiff. The grievance on Plaintiff's behalf was taken through the second step and was dismissed at the third step; it never went to final arbitration. Wall Aff., Pl. Exh. A.

Plaintiff returned to work in Defendant's Plano office on July 24, 1992 under "permanent restrictions" that his doctor had ordered. Plaintiff was allowed to work for four hours per day, with significant limits on lifting, carrying, pivoting at the waist, reaching, sitting, and

standing.[1] Wall Aff. Pl. Exh. A; Patton Decl., Def. Exh. 2 and attachment D; Declaration of Gina Logan ("Logan Decl."), Def. Exh. 1 ¶ 2 and attachment A. When he received the partial release from his doctor, Plaintiff assumed that he would be able to return to his job as a CSS, albeit in a restricted capacity. It was Plaintiff's understanding that his doctor would reevaluate the restrictions two weeks later, based on Plaintiff's experience as a part-time CSS. Wall Aff., Pl. Exh. A.

However, instead of resuming his CSS job, Plaintiff performed light duty work for Defendant GTE from July 24, 1992 to September 17, 1992. Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh. 2. Three other GTE employees also had light duty assignments in the Plano office during this period: James Chlebowski, Bo Ellerbee, and Robert Grimes. Patton Decl., Def. Exh. 2; Logan Decl., Def. Exh. 1 ¶ 2. On August 12, 1992, Defendant received a second report from Plaintiff's doctor that confirmed Plaintiff's physical restrictions and again limited him to four hours of work per day. Logan Decl., Def. Exh. 1 ¶ 3 and attachment B.

On September 17, 1992, Plaintiff was told to leave work and return to workers' compensation status. Another employee, Robert Grimes, was also taken off

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[1] According to Plaintiff, he was released to work "on a trial basis working approximately 4 hours/day with some various physical restrictions, i.e., occasional lifting of 58 lbs. from floor to knuckle; occasional lifting of 48 lbs. from knuckle to shoulder; occasional lifting of 38 lbs. from shoulder to overhead; no carrying over 35 lbs; no waist pivot with over 55 lbs.; no sitting over 4 hours; no standing over 10 minutes; walking was unlimited and I was permitted to climb and crawl." Wall Aff., Pl. Exh. A.

light duty work on that date. Defendant GTE maintains that there was not enough light duty work to occupy four employees, and that it retained the two most senior employees, Bo Ellerbee and James Chlebowski, in conformity with the terms of the collective bargaining agreement then in force. Patton Decl., Def. Exh. 2 and attachment A; Logan Decl, Def. Exh. 1¶ 4. Douglas Patton, Defendant GTE's Regional Administrator for Labor Relations, attests that the August 16, 1992 Agreement of Recognition, Bargaining Procedure, and Operating Contract between Defendant GTE and Communications Workers of America ("the collective bargaining agreement") controlled the terms and conditions of Plaintiff's employment at that time. Patton Decl., Def. Exh. 2 ¶ 2 and attached Exh. A.

On September 18, 1992, Plaintiff contacted one of Defendant's employees and asked when he could get back to work. Gina Logan, who was a Facilities Supervisor – Installation and Maintenance at the time, reports that Plaintiff sought her advice, and that she told him he needed a full medical release to return to full duty. Logan Decl., Def. Exh. 1 ¶ 5. However, Plaintiff maintains that he spoke with acting supervisor and union steward Barbara Hanson, rather than Logan, about Defendant's insistence on a full medical release. Wall Aff., Pl. Exh. A. In any event, Plaintiff never submitted such a release, and Plaintiff remains under permanent restrictions. *Id.;* Logan Decl., Def. Exh. 1 ¶ 5.

On September 18, 1992, Plaintiff filed charges of discrimination with the EEOC, alleging that Defendant GTE had removed him from light duty because of his age and

in retaliation for filing a previous charge of discrimination and had thus violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII") and the Age Discrimination in employment Act of 1967 ("ADEA"). Plaintiff also alleged that Defendant GTE had failed to accommodate his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (West Supp. 1994). Wall Aff., Pl. Exh. A; Patton Decl., Def. Exh 2 and attachment E.

According to Gina Logan, Plaintiff moved to Angleton, Texas sometime in the fall of 1992 but did not officially inform Defendant of his relocation. Logan states that she had to ask a co-worker to determine Plaintiff's whereabouts. Logan Decl., Def. Exh. 1 ¶ 5. Plaintiff maintains that he informed Logan of his move; he also notes that he received supplementary benefits checks from Defendant at his Angleton address. Wall Aff., Pl. Exh. A. Plaintiff never responded to Defendant's June 14, 1993 letter confirming that his benefits had expired and inquiring whether he desired to return to work, resign, or take a voluntary six-month leave of absence. Declaration of M.F. Fannin ("Fannin Decl."), Def. Exh. 3 ¶ 2 and attachment A.

Plaintiff filed suit against Defendant on June 25, 1993 in the 162nd Judicial District of Dallas County, Texas. *See* Original Petition. Contending that Plaintiff's claims were governed by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (West Supp. 1994), Defendant removed the case to this Court on July 30, 1993. *See* Notice of Removal.

On August 12, 1993, Defendant sent Plaintiff a follow-up letter, which clarified that Defendant would regard failure to contact a supervisor by August 27, 1993 as Plaintiff's election to leave employment. Fannin Decl., Def. Exh. 3 ¶ 2 and attachment B. In a letter dated August 12, 1993, counsel for Plaintiff warned Defendant that Plaintiff had filed charges with the EEOC and that "this could only constitute further retaliation for having asserted his rights as provided by law." Fannin Decl., Def. Exh 3 ¶ 2 and attachment C.

Plaintiff's First Amended Original Complaint, filed February 15, 1994, seeks redress of violations of the ADA, the Texas Commission on Human Rights Act ("TCHRA"), Tex. Rev. Civ. Stat. Ann art. § 5221k (West Supp. 1993),[2] and the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. § 8307c (West Supp. 1993).[3] Plaintiff alleges that Defendant discriminated against him by terminating him, by discriminating against him in the terms, conditions, and privileges of his employment, and by failing to accommodate his disability. First Amended Original Complaint ¶ 5. Plaintiff alleges that he filed timely

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[2] Section 5221k has been repealed and recodified with amendments as Tex. Labor Code Ann. § 21.001 *et seq.* (West Supp. 1994). However, the repealing act has no effect on complaints filed with the Texas Commission on Human Rights before September 1, 1993. Act of May 24, 1993, 73rd Leg., ch. 276, § 9.

[3] The Court notes that Tex. Rev. Civ. Stat. Ann. art. 8307c (West Supp. 1993) was repealed and recodified in the Texas Labor Code, 1993, 73rd Leg., ch. 269, § 1, effective September 1, 1993. Sections 451.001-.003 of Tex. Labor Code Ann. (West Supp. 1994) contain the provisions of article 8307c and do not alter the substantive law.

charges of discrimination and disability with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights, and that he thereafter received notice of his right to sue. First Amended Original Complaint ¶ 6; Wall Aff., Pl. Exh. A, attached Exh. 1, dated March 4, 1994. Plaintiff seeks a permanent injunction, a declaratory judgment, backpay, frontpay, damages, exemplary damages, attorneys' fees and costs, and other relief. First Amended Original Complaint ¶ 8.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. The threshold inquiry, therefore, is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the nonmovant's case. *See Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.), *cert. denied*, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992).

Once the moving party shows that it is entitled to summary judgment, the burden shifts to the nonmoving party to "come forward with 'specific facts showing that

there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Rule 56(e)); *see also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195-98 (5th Cir. 1986). A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Stated another way, "[i]f the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing Matsushita, 475 U.S. at 587). However, all of the evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

B. Defendant's Motion for Dismissal or Summary Judgment

Plaintiff complains of discriminatory treatment and discharge in violation of the Texas Commission on Human Rights Act ("TCHRA"), Tex. Rev. Civ. Stat. Ann. art. 5221k (West Supp. 1993)[4] and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (West Supp. 1994). Plaintiff also asserts a claim for retaliation under article 8307c of the Texas Workers' Compensation Act[5] and possibly under the ADA as well.

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[4] *See* note 2 *supra*.

[5] *See* note 3 *supra*.

Defendant's Motion for Summary Judgment attacks Plaintiff's claims in two main ways. First, Defendant argues that Plaintiff's claims are preempted by § 301 of the Labor Management Relations Act because evaluating them will require analysis of the terms of the August 16, 1992 collective bargaining agreement. Defendant's Motion at 4-11. Second, Defendant contends that Plaintiff has failed either to state a claim or to meet his summary judgment burden of raising a fact issue regarding essential elements of his claims under article 8307c, the ADA, and the TCHRA. Defendant's Motion at 12-14; Defendant's Reply at 8-10.

1. Satisfaction of Statutory Prerequisites

In its Motion, Defendant also asserts that Plaintiff has not satisfied statutory prerequisites to suit under the ADA or the TCHRA. Defendant's Motion at 12. However, a Notice of Right to Sue regarding Plaintiff's discrimination claims issued on March 4, 1994. Wall Aff., Exh. A, attached Exh. 1. It appears to the Court that Plaintiff has satisfied the statutory prerequisites to suit under 42 U.S.C. § 12117(a) and 42 U.S.C. § 2000e-5(f)(1). *See Pinkard v. Pullman-Standard, Div. of Pullman, Inc.*, 678 F.2d 1211, 1215 (5th Cir. 1982) (holding that right-to-sue letter is condition precedent, which can be fulfilled after filing suit), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729 (1983); *see also James v. Texas Dept. of Human Services*, 818 F. Supp. 987, 990 (N.D. Tex. 1993).

2. Preemption by Section 301 of the LMRA

Defendant asserts that the LMRA preempts Plaintiff's state law claims. Fifth Circuit precedent dictates that, in typical cases, Section 301 of the LMRA will not preempt state law claims of retaliation or discrimination. *Compare Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S.Ct. 1877, 1883 (1988) (holding that Section 301 of LMRA only preempted state law claims if their resolution required interpretation of terms of collective bargaining agreement) *and Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1089-92 (5th Cir. 1991) (holding that claims of retaliatory discharge arose under the Texas Workers' Compensation Act and were not preempted by federal law) *with Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir.), *cert. denied*, 114 S.Ct. 79 (1993) (holding that case was not "typical straightforward case" alleging discriminatory discharge because it directly challenged legality of settlement provision of collective bargaining agreement, thus warranting preemption by Section 301 of LMRA) *and Martin v. District No. 1 -- Marine Engineers' Beneficial Assoc. / Nat'l. Maritime Union*, 1994 WL 34044 (E.D. La. 1994) (holding that discrimination claims in atypical case directly challenged provisions of collective bargaining agreement and were preempted by Section 301.)

Defendant has not persuaded the Court that Plaintiff's state law claims in this case are atypical enough to warrant LMRA preemption. While Defendant's decision to remove Plaintiff from light duty may implicate the seniority provisions of the collective bargaining agreement to some degree, Plaintiff's arguments encompass

other actions that stand apart from the collective bargaining agreement, most notably Defendant's refusal to allow Plaintiff to return to his Customer Services Specialist position and Plaintiff's alleged termination. The Court will assess the merits of Plaintiff's claims by summary judgment standards.

3. Retaliation

Plaintiff appears to present claims of retaliation discharge under both state and federal law. The insufficiency of Plaintiff's evidence has led the Court to conclude that summary judgment must be granted to Defendant on Plaintiff's retaliation claims, whether they are brought under article 8307c of the Texas Workers' Compensation Act (now Tex. Labor Code Ann. § 451.001-.003) or under the retaliation provisions of the ADA.

Under the former article 8307c, a plaintiff alleging retaliation has the burden of establishing a causal link between his discharge and his claim for workers' compensation. Then the employer must show that it had a legitimate, non-discriminatory reason to discharge the plaintiff. *See Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991).

Plaintiff contends that his assertion of a workers' compensation claim resulted in discriminatory treatment. Wall Aff., Pl. Exh. A. Other than his subjective belief, however, Plaintiff offers nothing material in support of this assertion. Plaintiff's evidence regarding his alleged mistreatment by a former supervisor, David Debusman, is simply not relevant to claims involving Plaintiff's July

24, 1992 light duty assignment, September 17, 1992 return to workers' compensation, or August 27, 1993 deadline for contacting Defendant GTE. As of May 26, 1992, Debusman transferred to a different department within GTE, where he no longer had supervisory authority over Plaintiff. Debusman played no role in the complained-of employment decisions. *See* Defendants' Reply at 8-9; Lumpkin Decl. ¶ 6. The declarations of Keith Erwin, Donald E. Ingram, and John D. McBride concern Debusman's animus toward Plaintiff, which was allegedly related to his back injury. These declarants' perceptions lack relevance to employment decisions that did not involve Debusman; they also appear to rely in part on matters outside the declarants' personal knowledge. *See* Response attachments 5, 6, and 7.[6] The Declarations of Keith W. Huyck, while based on his personal knowledge of Debusman's statements and actions, are still irrelevant because plaintiff has failed to establish a link between the behavior Huyck describes and Defendant's allegedly retaliatory actions. *See* Response attachments 8 and 9.

Under the ADA, a *prima facie* case of retaliation must include the following elements: a showing that the plaintiff engaged in protected activity; an adverse employment action against employee; and the existence of a causal connection between the protected activity and the

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[6] All three declarations respond to a paragraph of questions supplied by Plaintiff. The Court notes that Erwin's declaration, Response attachment 5, is speculative and not does not recount personal knowledge of specific events. Ingram's "declaration," Response attachment 6, mostly consists of initials approving sentences written by Plaintiff. Portions of McBride's declaration, Response attachment 7, are also speculative.

adverse action. *See Harmer v. Virginia Elec. and Power Co.*, 831 F. Supp. 1300, 1308 (E.D. Va. 1993) (citations omitted). In the ADA context, Plaintiff seems to allege that his employer retaliated against him for filing his EEOC charge, and perhaps for requesting "reasonable accommodation" as well. However, none of the evidence that Plaintiff has submitted shows that a causal connection exists between his actions and Defendant's decisions to assign him to light duty, to return him to workers' compensation status, or to consider him to have abandoned his job after August 27, 1993.[7] Because David Debusman did not exercise authority over Plaintiff in the relevant time period, evidence of Debusman's negative attitude toward Plaintiff is off-point. *See Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 792 (W.D. Okl. 1993) (holding that evidence of derogatory remarks by plaintiff's supervisor was irrelevant when supervisor played no role in employment decisions.)

Because Plaintiff has not presented a *prima facie* case of retaliation, the Court grants summary judgment to Defendant on Plaintiff's retaliation claims.

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[7] Even if Plaintiff had established a *prima facie* case of retaliation, he would not escape summary judgment because he has not adduced evidence to show that Defendant's stated reasons for these decisions were pretexts for discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2747, 2747-49 (1993); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 n. 22 (5th Cir. 1994); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958-59 (5th Cir. 1993); *Harmer*, 831 F. Supp. at 1308.

4. Discrimination under the ADA

Plaintiff also asserts an employment discrimination claim under Title I of the ADA. The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. ¶ 12112(a) (West Supp. 1994).

As a first step in an ADA employment discrimination analysis, the Court must determine whether Plaintiff has a "disability" as defined by the statute. Under the ADA, a disability is either a physical or mental impairment that substantially limits one or more of an individual's major life activities, a record of such impairment, or being regarded as having such impairment. 42 U.S.C. § 12101(A)-(C) (West Supp. 1994). The Court has before it evidence showing that Plaintiff's physical impairment has limited his mobility significantly and has restricted him to part-time work. *See* Wall Aff., Pl. Exh. A; *see also* Logan Decl., Def. Exh. 1 and attachments A and B. For the purposes of this summary judgment motion, the Court will assume that Plaintiff is disabled under the ADA.

The second step of the analysis requires the Court to determine whether Plaintiff is a "qualified individual with a disability." The ADA defines such a person as a disabled individual who, with or without reasonable accommodation, can perform the essential functions of his or her position. 42 U.S.C. § 12111(8) (West Supp. 1994). Under applicable regulations and standards, an

individual with a disability is "otherwise qualified" if he or she is qualified for a job except that, because of the disability, reasonable accommodations must be made to allow the person to perform the job's essential functions. 29 C.F.R. app. § 1630.9 (1992).

Plaintiffs have the burden of establishing both that they are disabled and also that they are otherwise qualified. *Chandler v. City of Dallas*, 2 F.2d 1385, 1393-94 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994) (interpreting the Rehabilitation Act, 29 U.S.C. §§ 701-796, which parallels the ADA in this respect). After assessing the evidence presented by the parties, the Court has concluded that Plaintiff has not shown himself to be "otherwise qualified" for the CSS job.

Plaintiff alleges that Defendant discriminated against him by making him perform light duty work rather than allowing him to return to his CSS position on a part-time, restricted basis. *See* Wall Aff., Pl. Exh. A. However, Defendants' summary judgment evidence sets forth the reasons that Plaintiff was assigned to light duty. Now retired, Gina Logan was working for Defendant in 1992 as a Facilities Supervisor – Installation and Maintenance. She received the July 24, 1992 report from Plaintiff's doctor regarding his restrictions and the updated August 12, 1992 report showing that they would continue. Logan's testimony confirms that, because Plaintiff's restrictions prevented him from performing CSS functions, "he was allowed to perform light duty work." Logan reports that the only light duty work available was "telephoning customers to make sure their service needs had been fulfilled, and logging and tracking other employees' 'down

time' to assist us in analyzing productivity." Logan Decl., Def. Exh. 1 ¶¶ 2-4.

Defendant has presented additional summary judgment evidence detailing the requirements of the CSS position. In his declaration, Terry Lumpkin, a Facility Supervisor – PBX Data for Defendant, attests to the physical and business requirements of the CSS job. His testimony draws on both his previous experience as a CSS and his experience in his current position in the Plano facility. Lumpkin offers detailed explanations of the following essential CSS functions: making repairs that entail standing for "significantly more than ten minutes at a time," either on the ground or on a ladder, regardless of the location of the cable; installing telephone extensions and protectors, which requires the CSS to perform overhead work while standing on a ladder; and frequent lifting of unwieldly equipment, often weighing up to 60 lbs. Lumpkin Decl. ¶¶ 1-3, 5.

Defendant's evidence also clarifies the reasons that Defendant has kept the CSS job as a full-time position. Lumpkin states that, as a regulated telephone service provider, Defendant GTE must comply with stringent response requirements. According to Lumpkin, assignments usually last longer than four hours, and Defendant cannot allow a CSS to leave a job unfinished. Because Defendant must often work within specific time frames to accommodate customer requests, a CSS needs to be available for eight hours of work per day. Lumpkin Decl. ¶ 4.

Both Plaintiff's affidavit and the declaration of Donald E. Ingram, Response attachment 3, present their beliefs that the essential functions of the CSS position

could be modified to fit Plaintiff's limitations.[8] Plaintiff and Ingram suggest that a CSS mostly lifts items weighing less than 60 lbs. and that much of the cable in the Plano area is buried, lessening the amount of time a CSS would need to stand on a ladder. They also assert that, since Defendant's CSS employees occasionally take a half-day of vacation, thus working for four hours, the CSS job can be filled by a part-time worker. Wall Aff., Pl. Exh. A; Ingram Decl., Response attachment 3.

The ADA gives weight to an employer's definition of the essential functions of a job. Section 12111(8) provides that, "[f]or purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential. . . . " 42 U.S.C. § 12111(8). The statute does requires an individual to be able to "perform the essential functions of the employment position." *Id.* The ADA would not obligate Defendant to allow Plaintiff to return to his CSS job if he could not longer perform it adequately. *See Bolton v. Scrivner, Inc.*, 836 F. Supp. 783, 788 n.4 (W.D. Okl. 1993) (observing that ADA does not require employers to modify actual duties of specific job in order to make accommodation for individuals who are not physically capable of performing them.) Plaintiff and Ingram seem to agree that plaintiff can perform only a portion of the essential CSS duties, as defined by Defendant. Plaintiff's evidence does not raise a fact issue as to whether reasonably accommodation

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[8] The Court must disregard the statement on this topic made by Keith Erwin in Response attachment 4 because the statement does not conform to the requirements of 28 U.S.C. § 1746.

would enable Plaintiff to satisfy all the requirements of the CSS job.

In a factually similar case, the district court discussed the limits of accommodation under the Rehabilitation Act and noted that an employer was not required to accommodate a disabled individual by "eliminating one of the essential functions of his job." *Florence v. Frank*, 774 F. Supp. 1054, 1061 (N.D. Tex. 1991) (citations omitted). The court observed that, "if the plaintiff's handicap would prevent him from doing the job in question, he cannot be found to be 'otherwise qualified.' " In *Florence*, the court found the plaintiff to be unqualified for the job in question because he could only work four hours of an eight hour job and because his physical limitations prevented him from carrying out a key function -- hand delivery of the mail. *Florence* at 1061-62.

The parties in this case also dispute whether Plaintiff was effectively terminated when he was returned to workers' compensation status on September 17, 1992, or whether Plaintiff abandoned his job by failing to respond to Defendant's letters in the summer of 1993. Plaintiff contends that Defendant effectively fired him when it removed him from light duty, and that disability discrimination prompted his termination. Defendant maintains that Plaintiff's removal from light duty was dictated by the collective bargaining agreement because he was the least senior employee on light duty assignment. As the court in *Florence* observed, "[a]n employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner that would usurp the legitimate rights of their employees in a collective bargaining agreement." *Florence* at 1062.

The Court concludes that Plaintiff has failed to raise a fact issue as to whether he is a "qualified individual with a disability." Because Plaintiff has not satisfied this element of a *prima facie* case of discrimination under the ADA, the Court grants summary judgment to Defendant on this claim.[9]

5. Discrimination under the TCHRA

It is not clear to the Court whether Plaintiff is disabled for purposes of the TCHRA, Tex. Civ. Stat. Ann. art. 5221k § 1.04(b) (West Supp. 1993) (repealed and replaced with Texas Lab. Code § 21.105 (West Supp. 1994), effective Sept. 1, 1993).[10] Even if the Court assumes that he is

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[9] The elements of a *prima facie* case of employment discrimination under the ADA have not yet been clearly articulated by the Fifth Circuit. A few other jurisdictions have determined that, to make out a prima facie case of discriminatory discharge under the ADA, a disabled plaintiff must show that he or she was replaced by nondisabled person. *See, e.g., Sherman v. Optical Imaging Systems, Inc.*, 843 F. Supp. 1168, 1181 (E.D. Mich. 1994); *Jones v. Grindstaff*, 1993 WL 498957 (E.D. Tenn. 1993). The Court notes that Plaintiff has not presented summary judgment evidence showing that a nondisabled individual replaced him.

[10] The Fifth Circuit has construed the TCHRA's standard to be more restrictive than the federal definition of "handicap" under the Rehabilitation Act. *See Chandler*, 2 F.3d at 1397 (interpreting *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987)). However, the definition of disability in the version of the TCHRA that applies to this case may be broader, in keeping with the federal models. *See Coghlan v. H.J. Heinz and Ore-Ida Foods, Inc.*, 1994 WL 172204 (N.D. Tex. 1994). In any event, the reasoning behind the Court's dismissal of Plaintiff's ADA claim also applies to Plaintiff's TCHRA claim.

disabled under the TCHRA, Plaintiff will not prevail. Art. 5221k § 1.04(b) of the TCHRA only applies to disability that "does not impair an individual's ability to reasonably perform a job." For the reasons explained in the preceding section, the Court concludes that Plaintiff has failed to show that he was able to reasonably perform the CSS job despite his disability. Plaintiff has not established a *prima facie* case of discrimination under the TCHRA, and Defendant is entitled to summary judgment on the claim.

6. Evidence unrelated to claims before the Court

The Court observes that Plaintiff has submitted very little relevant summary judgment evidence in support of his Response and Opposition. Many of the declarations submitted by Plaintiff describe his feelings of frustration and depression, which his family and friends attribute to his dealings with Defendant GTE. *See* Response attachments 10, 11, 12, 13, and 15.[11] But because such testimony does not address any of the legal claims raised by Plaintiff's Response, the Court is obliged to disregard it. The Court has also ignored the portions of Plaintiff's affidavit that criticize union stewards Barbara Hanson and Keith Huyck for not filing grievances on his behalf because they do not relate to claims before the Court. *See* Wall Aff., Pl. Exh. A. The declaration of Sowana Johnson,

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[11] The Court notes that Section 301 of the LMRA preempts state law emotional distress claims that relate to employment discrimination. *See Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 300 (5th Cir. 1994).

which states that Plaintiff is currently seeking employment, is not relevant at the summary judgment stage. *See* Pl. Exh. 14.

III. CONCLUSION

Plaintiff's scanty summary judgment evidence fails to create an issue of material fact regarding either retaliation or discrimination. Defendant's Motion for Summary Judgment is **GRANTED.** Judgment will be entered accordingly.

SO ORDERED.

DATED: May 31, 1994

/s/ Barefoot Sanders
BAREFOOT SANDERS,
Chief Judge
United States
District Court
Northern District
of Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL, Plaintiff	*	Civil No. 3:93-CV-1546-H
v.	*	
GTE SOUTHWEST INCORPORATED, Defendant	*	

JUDGMENT

(Filed May 31, 1994)

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, filed May 31, 1994.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Michael R. Wall take nothing by his suit against Defendant GTE Southwest Incorporated, and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SO ORDERED.

SIGNED this 31 day of May, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
Chief Judge
United States
District Court
Northern District
of Texas

APPENDIX D

Fifth Circuit Local Rule 47.6: Affirmance Without Opinion

The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th CIR.R 47.6" or "ENFORCED. See 5th CIR.R 47.6."

(Amended June 17, 1986; Feb., 1987; Oct. 20, 1992; amended effective Jan. 1, 1995.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL R. WALL Plaintiff, v. GTE SOUTHWEST INCORPORATED, Defendant.	)	CIVIL ACTION NO. 3:93-CV1546-H

AFFIDAVIT OF MICHAEL R. WALL

BEFORE ME, the undersigned authority on this day personally appeared Michael R. Wall, who after being duly sworn deposed as follows:

> "My name is Michael R. Wall. I am over the age of 18 years of age, am of sound mind and am in all ways competent to make this oath. All of the matters expressed herein are true and correct and are of my personal knowledge. I am the Plaintiff in this case. I was employed by the Defendant, GTE Southwest, Incorporated until I was terminated.
>
> I began my employment with GTE in September 1982. I was employed as a Customer Service Specialist. As a Customer Service Specialist my duties included: installation and repair of residential and small businesses telephone services. On or about March 6, 1992 I injured my back while I was in the course and scope of my employment with GTE. I was taken off of work by doctor, Dr. Tennell, the first doctor I saw on

my on-the-job back injury. I then began receiving workers' compensation benefits.

After having been off from work as a result of the March 6, 1992 on-the-job injury, I returned to work in approximately July 1992 with permanent restrictions placed on me by my doctor, Dr. Cable. Specifically, I was released to return to work on a trial basis working approximately 4 hours/day with some various physical restrictions, i.e., occasional lifting of 58 lbs. from floor to knuckle; occasional lifting of 48 lbs. from knuckle to shoulder; occasional lifting of 38 lbs. from shoulder to overhead; no carrying over 35 lbs; no waist pivot with over 55 lbs; no sitting over 4 hours; no standing over 10 minutes; walking was unlimited and I was permitted to climb and crawl. I was to follow up with Dr. Cable in two weeks to see how I was adjusting at my Customer Service Specialist job with my restrictions. When I returned to work, I informed Fred Chasak and Pam McClure at GTE of my permanent restrictions.

The weights of objects such as house wire and aerial drop wire and small ladders which I was required to occasionally lift on my job were within these weight restrictions, provided I carried or lifted them within my restrictions. I also had access to the use of an aerial bucket truck which allowed me to avoid having to climb up poles. At the time of my injury I was routed primarily to west and northwest part of Plano, Texas. Based on my experience working in this area, this area as approximately 90% buried cable. Working on buried cable requires no pole climbing and also I would not have to carry the

28 foot ladder. These statements are further supported in Exhibits 3 and 4 attached hereto.

I was regularly employed by GTE as a Customer Service Specialist, but upon my return to work in July 1992, GTE placed me in a light duty position rather than placing me in my former position. After I was placed under the permanent restrictions by Dr. Cable, GTE never gave me the chance or the option to return to my Customer Service Specialist position, either with or without reasonable accommodation. GTE made no effort to make accommodations for my disability so as to assist me in performing my regular job duties.

Under Dr. Cable's various restrictions I could have performed the Customer Service Specialist job with reasonable accommodations and in 4 hour shifts. Based on my past experience working in the Customer Service Specialist position this job could be properly performed in 4 hour increments and in accordance with my doctor's restrictions. It was my understanding from Dr. Cable that I was to return to work on a trial basis and to report back to him to see if my restrictions could be altered or my work days increased based on my progress. It was my understanding from Dr. Cable that since GTE would not let me return to my Customer Service Specialist position on a trial basis that my capacity to work with respect to my Customer Service Specialist position could not be properly and fairly re-evaluated.

On or about September 17, 1992, Fred Chasak informed me and Robert Grimes (another GTE employee on light duty after an on-the-job injury) that there were four people on light duty.

Chasak told Grimes and me that were being taken off from work and placed back on workers' compensation. According to Chasak, he said there is not enough light duty work for four employees and that he was putting me and Robert Grimes back on workers' compensation. Bo Ellerbee and Jim Chlebowski, were the other two employees who had previously been working on light duty with Grimes and me. I have since learned from Jim Chlebowski at GTE that Chlebowski was actually released to return to full duty work on or about September 14, 1992. I was told by Bo Ellerbee, the employee retained for light duty after I was taken off light duty, that he was restricted from performing outside work. Prior to my termination, I saw Chasak and/or Hansen sending Ellerbee on outside jobs such as verifying telephone numbers; taking meter readings at residences; and checking on various problems and speaking with customers. I was not restricted from performing outside jobs. Instead of retaining me to perform these outside jobs, GTE removed me from light duty and worked Ellerbee in violation of his restrictions.

I later called an "in-charge" or acting supervisor Barbara Hansen, who is also a union steward, to see what I would need to do in order to return to work. According to Hanson, Chasak stated that before Grimes and I could return work we would have to receive a full duty release from our doctors or more light duty was available. Hanson told me she was sorry about this. Contrary to Gina Logan's declaration, I did not speak to Gina Logan on this issue, I spoke to Hanson. I also spoke to Keith Huych, a Union Steward, on September 17, 1992 after Chasak

had said Grimes and I could no longer work and he told me he did no know what he could do for us and that Grimes and I should go ahead and follow through with your attorneys. Neither Hansen or Huych filed grievance on my behalf after I was taken off light duty and told not to return to work.

Steve Sanford was brought in to work light duty after I was taken off light duty. I was told this by Don Ingram or Keith Irwin, a Customer Service Specialist at GTE. I was not contacted by GTE to fill this light duty position that was given to Sanford.

I was thus terminated because GTE was aware that I would never get a full release, as the disability and restrictions placed on me by my doctor were permanent. I did not abandon my job with GTE.

Contrary to Gina Logan's declaration, prior to moving to Angleton, Texas I notified Gina Logan that I was moving. In fact, prior to my move, Gina Logan told me that since I could not work GTE in Plano and since I was moving I should try and bid on some jobs in the Stafford league City area which was close to the Angleton area. I also had a forwarding number on my phone. Also, I timely received my supplementary benefits check from GTE at my address in Angleton.

I am currently still under permanent restrictions by my doctors, Dr. Zweighaft and Dr. Sadeghpour.

Since my termination from employment at GTE I have sought employment at numerous places such as: Brazoria County Sheriff's Department;

the Post Office in Angleton, Texas and the Texas Department of Corrections in Huntsville. Exhibit 15 attached hereto supports the fact that I have been looking for work through SER Jobs for Progress. Despite my efforts, I have been unable to find a job. Because of my back injury and my restrictions, I am limited in the types of work I can perform. I have to constantly be aware of my back condition and have to be cautious about the work I perform so as not to further aggravate my injury. I am restricted from standing for a long period of time, and I am restricted in my ability to reach, push and pull.

The union had filed grievance on my behalf in approximately May or June of 1992 regarding discriminatory treatment I was receiving from David Debussman, my supervisor at the time, after I was injured on the job. This grievance was taken through the second step, and I had it dismissed at the third step. This grievance never went to final arbitration.

I presented my discrimination claims to the EEOC and received a notice of right to sue on each of these claims.

Attached hereto as Exhibit 1, is a true and correct copy of the "Notice of Right to Sue" I received regarding my charge of disability discrimination.

Attached hereto as Exhibit 2, is a true and correct copy of the "Notice of Right to Sue" I received regarding my charge of race and age discrimination.

I was discriminated against and terminated based on my disability and in retaliation for

having pursued benefits under the Texas Workers' Compensation Act. As a result, I have suffered extreme mental anguish and have been harmed beyond reproach. I was not even given a chance to prove myself an able worker after I was released to return to work after my on-the-job injury. Instead GTE made me feel worthless by placing on light duty and then later taking even that away. I suffered mental anguish over they way GTE treated me to the point that I became severely depressed and had to seek psychiatric treatment. The pain GTE has put me through has been excruciating and unrelenting. These facts are additionally supported in Exhibits 10, 11, 12 and 13 attached hereto. GTE harmed me unmercifully by unlawfully terminating me and refusing to accommodate my disability, and in doing so acted knowingly, willfully and with malice.

Further Affiant Sayeth Not.

/s/ Michael R. Wall
Michael R. Wall

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of March, 1994.

/s/Marie Yvette Booth
Notary Public

(Seal)

MARIE YVETTE BOOTH
MY COMMISSION EXPIRES
August 19, 1997

APPENDIX F

DECLARATION OF DOUGLAS PATTON

My name is Douglas Patton, I am of sound mind, capable of making this Declaration, and am personally acquainted with the facts herein stated:

1. Currently, I am employed by GTE Southwest Incorporated in the position of Regional Administrator – Labor Relations, and I was, and continue to be familiar with the facts and records related to the status of Michael R. Wall with the company. I have served a total of eight years with the company. I have personal knowledge of the facts set forth in this Declaration, and they are true and correct. I am familiar with the records attached to my Declaration as Exhibits "A" through "D". The records are exact duplicates of documents from the business records of GTE Southwest Incorporated. They were kept by GTE Southwest in the regular course of business, and it was the regular course of business of GTE Southwest for an employee or representative of GTE Southwest with knowledge of the act, event, opinion, condition or diagnosis recorded to make the record or to transmit information to be included in the record. The records were made at or near the time or reasonably soon thereafter.

2. Michael Wall began his employment with GTE Southwest on September 13, 1982 as a Customer Service Specialist. Customer Service Specialists travel to GTE customer locations and perform installation and repair work on telephones and telephone cables, both aerial and buried. He has always been an hourly employee and a member of the bargaining unit represented by Communications Workers of America Local 6171. The terms and

conditions of his employment after August 16, 1992 were governed by the Agreement of Recognition, Bargaining Procedure and Operating Contract between GTE Southwest Incorporated and Communications Workers of America dated August 16, 1992. A true and correct copy of the Agreement is attached to this Declaration as Exhibit "A." The Agreement does not make provision for "light duty" work, but gives the company the right to determine the size of the work force. See Article XXVI, Section 2.1, page 93 of the Agreement. Consistently, GTE Southwest Incorporated follows a policy of permitting employees to work light duty work on occasion, upon request, but reserves its right to grant or deny light duty work within its own discretion. The Agreement also provides that decisions regarding the assignment of hours, among other things, shall be decided based upon seniority, in combination with the ability of the employee and the conditions of the business. See Article XVI, Section 2.1, page 64. The Agreement also provides that GTE has the right to schedule all tours and sessions of hourly employees. See Article X, Section 5.1, p. 26.

3. I have reviewed Wall's employment records. The records indicate that he reported a back injury on March 11, 1992 that had occurred on March 6, 1992. Exhibit "B" to my Declaration is a true and correct copy of the incident report. He was off work and on workers' compensation beginning March 13, 1992 until he was released to perform restricted duties on a half-day basis on July 24, 1992. Exhibits "C" and "D" to my Declaration are true and correct copies of the workers' compensation report and the medical statement pertaining to his partial

release. He performed light duty work during the summer of 1992 until September 17, 1992, when he was told to leave work and continue to receive whatever benefits he was entitled to under workers' compensation and/or GTE accident disability, along with a co-worker, Robert Grimes. Grimes and Wall were two of four employees performing light duty work at the time. The other two employees were Bo Ellerbee and James Chlebowski. The respective seniority dates of the four employees were as follows:

Name	First Day of Employment with GTE
Bo Ellerbee	9/8/81
James Chlebowski	12/14/81
Michael Wall	9/13/82
Robert Grimes	8/22/83

Wall did not file a grievance related to being returned to workers' compensation status in September of 1992.

4. GTE Southwest was also provided a copy of Wall's EEOC Charge, which indicates that it was filed on September 18, 1992. A true and correct copy of the Notice of Charge is attached to my Declaration as Exhibit "E." This is the only EEOC charge filed by Wall referencing discrimination due to disability.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON February 18, 1994.

/s/ Douglas Patton
DOUGLAS PATTON

APPENDIX G

DECLARATION OF GINA LOGAN

My name is Gina Logan, I am of sound mind, capable of making this Declaration, and personally acquainted with the facts herein stated:

1. Currently, I am retired from my employment with GTE Southwest Incorporated. I served a total of 20.5 years with the company. In 1992, I was employed by GTE Southwest Incorporated ("GTE") in the position of Facilities Supervisor – Installation and Maintenance. I had direct supervisory responsibility for Michael Wall for a period of time while he was employed by GTE as a Customer Service Specialist. I have personal knowledge of the facts set forth in this Declaration, and they are true and correct. I am familiar with the records attached to my Declaration as Exhibits "A" and "B." The records are exact duplicates of documents from the business records of GTE Southwest Incorporated. The records were kept by GTE Southwest in the regular course of business, and it was the regular course of business of GTE Southwest for an employee or representative of GTE Southwest with knowledge of the act, event, opinion, condition or diagnosis recorded to make the records or to transmit information to be included in the records. The records were made at or near the time or reasonably soon thereafter.

2. Although Michael Wall had been off work due to a back problem, on July 24, 1992, he was released to return to half-day duty, with physical restrictions, by Dr. James Cable. Exhibit "A." Since the restrictions imposed by Dr. Cable did not allow Mr. Wall to perform all the functions of a Customer Service Specialist, and indicated

that he was only to work half-days, he was allowed to perform light duty work. Customer Service Specialists perform their duties on a full-day, eight hour basis. The only "light duty" work available was telephoning customers to make sure their service needs had been fulfilled, and logging and tracking other employees' "down" time to assist us in analyzing productivity.

3. On August 12, 1992, we received another statement from Dr. Cable indicating that Mr. Wall's restrictions would continue, and not releasing him for anything more than half-day work. Exhibit "C."

4. During this time period, there were a total of four men performing "light duty" work in the Plano office. The four men were Robert Grimes, Michael Wall, James Chlebowski and Bo Ellerbee. There just wasn't enough work to keep them all busy, or to justify keeping all of them working light duty. Accordingly, two of the men were put back out on workers' comp. Of the four, the two least senior were Michael Wall and his co-worker, Robert Grimes. On September 17, 1992, Mr. Grimes and Mr. Wall were notified that they would no longer be allowed to perform "light duty." Mr. Wall, to my knowledge, returned to workers' comp status.

5. On September 18, 1992, Mr. Wall contacted me and asked when he could return to work. I told him that he would need to get a full medical release in order for him to return to full duty. To my knowledge, Mr. Wall moved to Angleton, Texas, near Houston shortly after he was placed back out on comp. He did not notify us of his move; I had to find out where he was from a co-worker. He never submitted a medical release to return to work.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON Feb. 18, 1994.

/s/ Gina Logan
GINA LOGAN

APPENDIX H

DECLARATION OF DONALD E. INGRAM

My name is Donald E. Ingram I am over eighteen years of age have never been convicted of a felony and am in all respects competent to make this affidavit. I have personal knowledge of each of the facts and opinion stated herein. I declare under the penalty of perjury that the statement contained here in are true and correct.

EXECUTED this day of 03-15 1994.

/s/ Donald E. Ingram
NAME

A BOX OF HOUSE WIRE WEIGHS 17 LBS. AND A BOX OF AERIAL DROP WIRE WEIGHS 33 LBS. AND A 28 FT. LADDER WEIGHS BETWEEN 50-55 LBS. I ALSO CONCUR WITH THE FACT THAT 75% OF OUR PLANT IS BURIED. GTE HAS A SYSTEM THAT DEPLOYS ITS EMPLOYEES TO CERTAIN AREAS. I ALSO RECALL THAT ME AND MIKE WALL WERE DEPLOYED IN THE WEST SIDE OF PLANO, WHICH HAS 90% BURIED PLANT. I HAVE BEEN DEPLOYED ON THE EAST SIDE OF PLANO WHICH HAS BURIED AND AERIAL PLANT AND ON OCCASION HAVE REQUIRED THE USE OF A BUCKET TRUCK. I HAVE ON OCCASION WORKED FOUR HRS AND TAKEN 4 HRS. OFF FOR EIGHTER PERSONAL TIME OR VACATION TIME. THIS IS A COMPANY POLICY PRESENTLY.

APPENDIX I

DECLARATION OF TERRY LUMPKIN

My name is Terry Lumpkin. I am over the age of 21 years and am competent to make this Declaration. I have personal knowledge of the facts stated in this Declaration, and they are true and correct.

1. I am currently employed by GTE Southwest Incorporated. I have been with the company for 20 years. My title is Facility Supervisor – PBX/Data, and I work in the Plano facility where Michael Wall worked. I did the same job as Michael Wall for four years, and have performed the essential functions of that job. I am well aware of the physical requirements of the job, as well as of the business requirements.

2. If a CSS were restricted to standing for only ten minutes at a time, he or she could not perform the job. No matter whether a CSS is working in an aerial or a buried area, he or she must stand, both on the ground, and on a ladder, for significantly more than ten minutes at a time. For example, on a typical assignment, a CSS will drive to a cross-connect box and stand in front of it for anywhere from 5 to 30 minutes or more, while he or she performs tasks or waits for information from other GTE departments. Then, the CSS will go to the house or business involved, and spend the rest of the time there, which typically runs from one to two hours, standing.

3. As another example, if a customer requests that a telephone extention be installed, a CSS may have to run external wiring up under the eaves of the roof. Regardless of whether the house is one or two stories tall, this

job requires either a four-foot, seven-foot, or taller ladder. Because it is difficult to work at eye level with the eaves, a CSS usually positions the ladder so that he or she can stand just under the area to be worked on, and will work overhead while standing on the ladder. This job cannot be performed if the CSS continually has to climb down off the ladder every ten minutes to rest. CSS's frequently have to install protectors on the outside of houses and buildings. By GTE policy, these are installed five feet off the ground -- again, standing for much longer than ten minutes is required.

4. The CSS job cannot be reasonably performed in four hours, either. GTE is a regulated telephone service provider. It is required to make a commitment to a customer who cannot receive or send calls that the service will be working within 24 hours of the time it is reported. GTE CSS's never leave a job unfinished as a matter of policy. Once a CSS is dispatched to a job, no matter how much overtime is required, he or she must stay until it is done. A CSS working only four hours would have to be continually relieved by another CSS in order to get work completed. Yes, there might be an occasion where one or two jobs might be completed within a four-hour period, but it would not be very frequent. The only other option would be for the restricted CSS to finish a long job in the beginning of the shift, and then simply do no more work for the rest of the shift. This would not constitute performing the CSS job, and is certainly not reasonable. A further complicating factor is the fact that many customers demand that work be started and completed between specific time periods, particularly when they are staying home from work in order to meet the CSS at their

home. A four-hour CSS shift does not provide the vital flexibility needed for the job.

5. Finally, the weight requirements of the CSS job, which include frequent lifting of up to 60 pounds, are essential. Even the four- and seven-foot ladders are heavy, and their awkward shape, particularly when extended, make them much harder to work with than simply their dead weight would suggest. Every CSS needs to be able to handle a long extension ladder as well. There is no way to guarantee that a job, even in an area with a lot of buried cable, will not include aerial work, or require a long ladder to reach a second story.

6. On May 26, 1992, David Debusman, who was Michael Wall's supervisor, stopped working at the Plano facility and transferred to a completely different department within GTE Southwest. After his departure in May, he had no further supervisory authority over Michael Wall, nor did he take or attempt to take any action with regard to Michael Wall.

7. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date: March 31, 1994 /s/ Terry Lumpkin
Terry Lumpkin

APPENDIX J

42 U.S.C. § 12102(a)-(c) (West Supp. 1995):

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111(8) (West Supp. 1995):

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C. § 12111(9)(B) (West Supp. 1995):

(9) Reasonable accommodation

The term "reasonable accommodation" may include –

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112(a) (West Supp. 1995):

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(b)(5) (West Supp. 1995):

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes –

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an

applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

42 U.S.C. § 12117(b) (West Supp. 1995):

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the

Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] not later than 18 months after July 26, 1990.